

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Kempshall LLC dba Zaboo

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary

Employer: Kempshall LLC dba Zaboo, 17 Kempshall Pl, Elizabeth NJ 07208

Date of Hearing: January 5, 2016

Case No.: 51773

BACKGROUND AND STATEMENT OF THE ISSUES

This hearing was consolidated with two other hearings for the claimant against separate employers, comprised of similar principals. Separate decisions have been issued for these hearings.

The claimant asserts she is owed \$3,500.00 in unpaid salary for pay periods worked between August 4, 2014 and September 21, 2014, or a total of seven weeks at \$500.00 per week. She did receive \$500 payments for the weeks ending September 13, 2014 and October 4, 2014.

At the hearing, Kempshall LLC presented a third check which the claimant had cashed. She conceded this check represented payment for the week ending September 27, 2014, and amended her claim to \$3,000 for the remaining six weeks at \$500 per week.

Mr. Romanick, the sole member of Kempshall LLC dba Zaboo, denies the claimant was an employee and further is due any wages. He testified he bought the business with the workers and hired additional folks. He did not consider the claimant as a manager to be an employee.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-

A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria in (b), (c), (d), (e), or (f). The claimant testified credibly that the employer dictated the means and manner of the work to be performed, and the time during which the work was to be performed. The claimant did not hire her own assistants. The claimant did not hold herself out to be in business for herself and did not have any recurring business liabilities or obligations, nor did she register with the state as a business. The claimant was not responsible for the satisfactory completion of work, and she could not be held contractually responsible for failure to complete the work.

The employer operated under the name First Choice Hospitality LLC dba Social 24 from at least February 2, 2014 through June 29, 2014, when the employer changed the company to 24 Depot LLC dba Zaboo. Larysa Budinski was the sole member of these LLC's. Orest Romanick purchased 24 Depot LLC dba Zaboo on August 4, 2014, at which time the name changed to Kempshall LLC dba Zaboo, with Mr Romanick as the sole member and Ms. Budinski in a management role.

The claimant worked for the employer operating as Kempshall LLC dba Zaboo (hereafter "the employer") from August 4, 2014 and September 21, 2014, when the business was purchased by Mr. Romanick. She expected she would receive a weekly salary of \$500.00, as she had with the prior companies.

Nazar Lopushansky, Larysa Budinski's son, originally hired the claimant to help Ms. Budinski with First Choice Hospitality LLC dba Social 24 and subsequently 24 Depot LLC dba Social 24 and Kempshall LLC dba Zaboo. The claimant provided credible testimony that Mr. Lopushansky represented to her that he was an owner of First Choice Hospitality LLC dba Social 24 and subsequently 24 Depot LLC dba Social 24.

The claimant provided credible and persuasive testimony that she performed work for the benefit of the employer but did not receive any salary for six weeks between August 4, 2014 and September 21, 2014, after the business had been purchased by Mr. Romanick. She did receive her regular salary for the week ending September 13, 2014.

Mr. Lopushansky, as a representative of Kempshall LLC, Larysa Budinski or Nazar Lopushansky, signed a promissory note for the claimant on September 30, 2014, outlining monies due to the claimant, including \$11,000 in wages for work performed April 27, 2014 through September 14, 2014, or twenty-two weeks at \$500 per week. Though the weeks outlined on the promissory note do not match the claimed weeks exactly, they are sufficiently similar to indicate the employer was aware of the wages owed to the claimant.

The Hearing Officer does not find the employer's argument that Mr. Lopushansky was not authorized to act on the employer's behalf credible or persuasive, as the employer was aware that Mr. Lopushansky had initially hired the claimant and continued to work with her during her employment with all three entities.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that she is due the claimed wages in the amount of \$3,000.00.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met her burden in this claim.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant proved by a preponderance of the evidence that she was not paid all wages/salary due, it is hereby ruled that the Wage Claim is valid in the amount of \$3,000.00.

The employer is hereby ordered to send a check to this Department, payable to Rhonda Hanks-Mumpini, in the total of \$3,000.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 26, 2016
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